UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOETTE PAULONE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:09-cv-2007 (ELH)
	)	
CITY OF FREDERICK, *et al.*,	)	
	)	
Defendants.	)	
	)	

INTERVENOR UNITED STATES' REPLY MEMORANDUM REGARDING ELEVENTH AMENDMENT IMMUNITY

At the invitation of this Court, see Docket No. 111, the United States intervened in this case pursuant to 28 U.S.C. 2403(a) for the limited purpose of defending the constitutionality of the abrogation of the States' sovereign immunity effected by Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12131-12134. See Docket No. 118 (United States Br.). In accordance with this Court's order, see Docket No. 122, the State of Maryland filed a response, see Docket No. 124 (State Response Br.), and the United States now files this reply memorandum.

ARGUMENT

TITLE II VALIDLY ABROGATES THE STATES' SOVEREIGN IMMUNITY IN THE CONTEXT OF CRIMINAL LAW ENFORCEMENT

The State declines to challenge, and thus implicitly concedes, many of the United States' arguments. First, the State does not dispute that this Court need not immediately adjudicate the constitutionality of Title II's abrogation. Such adjudication may prove to be unnecessary if, after the limited discovery that this Court ordered, it becomes clear that the defendants have accepted federal funds such that they face identical liability under Section 504 of the Rehabilitation Act, 29 U.S.C. 794.

See United States Br. 5-6; see also State Response Br. 2-3 (agreeing "that the courts should avoid unnecessary adjudication of the constitutionality of a federal statute").[1]

Second, the State does not dispute the United States' abrogation argument as the United States frames it – that, with respect to the broad class of cases involving law enforcement, Title II is a congruent and proportional response to the history of constitutional violations that it remedies and prevents. See United States Br. 16-23. Instead of engaging with that argument, the State argues that Title II is invalid Section Five legislation because it does not remedy constitutional violations *in this case*. See, *e.g.*, State Response Br. 6-7 (asserting that plaintiff has shown "no constitutional violation," and then recapping at length the facts of this case); *id.* at 12 ("Plaintiff has not identified that any constitutional right as [sic] implicated by the circumstances of her transitional stay in Central Booking.").

The State's position thus depends on the unstated premise that the validity of Title II's abrogation turns on whether Title II remedies a constitutional violation in this particular case, as opposed to a broad class of cases. Although the United States explained in its initial brief why a "class of cases" analysis is required, see United States Br. 8-11, the State offers no explicit argument to the contrary. Accordingly, the United States will add only a few additional words.

In support of its contention that Title II validly abrogates sovereign immunity only in those cases in which the relief a plaintiff seeks will remedy a constitutional violation, the State appears to rely primarily on *Brown* v. *North Carolina Division of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999). See

[1] Until the facts regarding federal funding are better established, the United States declines to take a position regarding whether Section 504 applies to the actions at issue in this case.

State Response Br. 2-3, 5. In *Brown*, the Fourth Circuit considered whether a regulation barring surcharges for disabled parking placards – one of many regulatory provisions implementing Title II – validly abrogated sovereign immunity. The court found that the regulation did not, because the barred surcharges had no "significant likelihood of being unconstitutional." See 166 F.3d at 707 (citation omitted).

While the United States continues to contend that *Brown*'s abrogation analysis has been entirely superseded by subsequent caselaw, see United States Br. 10, this Court need not go so far. The Fourth Circuit subsequently clarified that *Brown*'s focus on whether the discrimination remedied by one particular Title II application also violated the Constitution applies only in cases in which the validity of a Title II implementing regulation is at issue. See *Wessel* v. *Glendening*, 306 F.3d 203, 207-208 (4th Cir. 2002). And then, following *Tennessee* v. *Lane*, 541 U.S. 509 (2004), the Fourth Circuit examined the manner in which Title II remedies discrimination by all public entities in the broad "class of cases" involving "public higher education." See *Constantine* v. *Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 488 (4th Cir. 2005). Whatever may survive of *Brown* following *Lane* and *Constantine*, it surely no longer can stand for (if it ever could) the proposition that Title II abrogation analysis turns solely on whether the Constitution is violated in the particular case before the Court.[2]

The State's only other new argument is a suggestion that Title II does not apply at all to criminal law enforcement. See State Response Br. 7-10. The United States will not belabor this point, as this Court already has taken extensive briefing on it, but neither the text of Title II nor binding Fourth Circuit

[2] Of course, as the United States explained in its initial brief, if the Title II violation also represents a constitutional violation, then abrogation is automatically valid in that case, regardless of whether it would be in the broader class of cases. See United States Br. 10; *United States* v. *Georgia*, 546 U.S. 151, 159 (2006).

precedent supports the State's position. Plaintiff's arrest may not have been a service provided for her benefit, see *id.* 7, but Title II does not merely bar the "exclu[sion]" of an individual with a disability from a public service – it also provides that such an individual shall not "be subjected to discrimination" by a public entity. 42 U.S.C. 12132. To the extent that the Fourth Circuit suggested otherwise in *Rosen* v. *Montgomery County, Maryland*, 121 F.3d 154 (4th Cir. 1997), that decision has been overruled – first implicitly by *Pennsylvania Department of Corrections* v. *Yeskey*, 524 U.S. 206, 210 (1998), which held that Title II applies to prisons regardless of whether they provide benefits to prisoners, and then by *Seremeth* v. *Board of County Commissioners Frederick County*, 673 F.3d 333, 338-339 (4th Cir. 2012), which explicitly held that Title II applies to criminal law enforcement and rejected that much of *Rosen* that was inconsistent with such a holding. In short, as this Court already found even before *Seremeth*, *Rosen* no longer can support "the broad proposition that the ADA and the Rehabilitation Act are inapplicable to arrests." See *Paulone* v. *City of Frederick*, 787 F. Supp. 2d 360, 381 (D. Md. 2011); see also *Seremeth*, 673 F.3d at 337 (favorably citing this Court's rejection of the State's broad reading of *Rosen*).

CONCLUSION

This Court should first ascertain whether defendants have waived their sovereign immunity to suit under Section 504 of the Rehabilitation Act, in which case it is unnecessary to decide whether Title II of the ADA is valid legislation under Section Five of the Fourteenth Amendment. Should it reach the question, this Court should find that Title II of the ADA is valid Section Five legislation and thus abrogates the States' sovereign immunity in cases involving criminal law enforcement.

Respectfully submitted,

ROD J. ROSENSTEIN
United States Attorney

JOCELYN SAMUELS
Principal Deputy Assistant Attorney General

/s/ Larry D. Adams
LARRY D. ADAMS
Assistant United States Attorney
36 South Charles Street
Baltimore, MD 21201
(410) 209-4800
larry.adams@usdoj.gov

MARK L. GROSS
Deputy Chief, Appellate Section

/s/ Sasha Samberg-Champion
SASHA SAMBERG-CHAMPION
New York Bar No. 4312120
Attorney
U.S. Department of Justice
Civil Rights Division, Appellate Section
P.O. Box 14403
Ben Franklin Station
Washington, DC 20044-4403
(202) 307-0714
(202) 514-8490 (fax)
sasha.samberg-champion@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that, on May 25, 2012, the foregoing "Intervenor United States' Reply Memorandum Regarding Eleventh Amendment Immunity" was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to all counsel of record.

/s/ Sasha Samberg-Champion
SASHA SAMBERG-CHAMPION
Attorney